90-1813 (1)

Supreme Court, U.S.
FILED
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CITY OF TOLEDO,
DIVISION OF INSPECTION,

Respondent,

versus

MERRILL DUTRIDGE, AND
LLOYD W. DUTRIDGE,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. After a Trial Court has issued, an order based on a finding of a nuisance, for a home owner to complete repairs in 30 days to their 2-story, 2-vehicle garage and to secure and file a bond for $3,700 to secure the costs of destruction, is the Home Owner after filing a Motion showing substantial progress in the repair of the building to the point that the building can be saved, and the dangers from the nuisance have been met and removed, and the Home Owners have acted in good faith, constitutionally to a Hearing for the Trial Judge to determine if presently there is a real necessity to destroy the garage in order to protect the interests of the City?

2. Secondly, does the Court and/or the City Violate the due process Constitutional rights of the Home Owner, if the Court decides to order then the destruction of the garage, but the Court fails to notify the Home Owner's Counsel after the Court had stated there would

be a meeting with the Court and Opposing Counsel, before any final Action was determined by the Court, and also, the Court fails to provide or require the City to not dewtroy the garage until after the Home Owner has had a reasonable time to remove various items of Valuable Personal Property in the garage, which the City knows are in the garage?

3. Once a City receives an Order allowing the City to destroy a Citizen's 2-story garage, obviously substantial in size, is the City under a duty, imposed by the U.S. Constitution, to give the Home Owner a reasonable length of time to remove valuable items of Personal Property, when the Home Owners ask for a delay of approximately 30 minutes, and the City has known the Home Owners were opposing, but had not known of, the Judge's Order of demolition, and the City has also known the Home Owners had numerous items of Valuable Personal Property in the garage?

4. Is the Doctrine of Res Judicata to be applied by the Courts in a case involving the

Constitutional rights of the Home Owners to save their garage, costing a substantial sum of money, from Destruction by the City, only after the Courts make a finding that this and other constitutional issues have been fully, and fairly, Tried, and found, and were essential to the Judgment of a Court having clear jurisdiction thereof?

5. And likewise, is the Doctrine of Res Judicata to be applied, when the issue is whether Home Owners are entitled to reasonable notice ahead of time that the City is going to destroy the Home Owners' garage, so that the Home Owners may remove and save from destruction by the City, who knew the garage had valuable items of personal property worth in the Thousands of Dollars to the Home Owners; and that issue had not been clearly adjudged before?

6. Are Home Owners entitled to a New Trial when the Trial Judge has given comments and evidences that the Trial Judge favors the City, by voluntarily "Bailing Out" the City's Witnesses, and the City Counsel tried to commun-

icate that the City Acted under a Court Order when in Truth the City had no such Court Order, when the Trial Judge Instructs the Jury that the Home Owners had notice of impending destruction of their garage because their Counsel had been served with a Copy of the Court's Order, when in fact this instruction to the Jury was known by the Trial Judge to be Untrue, and lastly, when throughout the crucial stages of a Trial the Trial Court demonstrates favoritism to the City's Witnesses, and criticizes only the Home Owners' Attorney?

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CERTIFICATE OF SERVICE

3 copies of the foregoing Petition For Writ of Certiorari are served by First Class U.S. Mail to City of Toledo Law Director, Keith A. Wilkowski, One Government Center, Suite 2250, Toledo, Ohio 43624 this May 21, 1991.

John G. Rust

John G. Rust
Counsel of Record
for Appellants Dutridge

TABLE OF AUTHORITIES

	Page Number
Abraham v. City of Warren, 67 OA 492 (1940)	26.
16A Amer. Jur. 2d. Constitutional Law	33.
Goodson v. McDonough Power Equipment, 2 Ohio, St. 3rd 193 (1983)	37, 36.
In Re Branham, Appeal of, 70 Abs. 491 (Franklin County Court of Appeals, 1953)	32.
Jackson v. City of Columbus, 40 OA2d 92 (1974)	26.
Miles v. District of Columbia, 510 F2d 188 (CA, DC, 1975)	27.
Monell v. Department of Social Services, 436 U.S. 658	15.
Reed v. Rhodes, 500 F. Supp. 363 (1980)	23.
Solly v. City of Toledo, 7 Ohio St. 2d 16, 36 O.O. 2d 9	30.
Tingle v. City of Wichita, 505 P2d 717 (1973)	25.

REFERENCES TO REPORTS OF OPINIONS DELIVERED BY LOWER COURTS.

No Opinion by any Court in this Case has been published in any Official or Unofficial reports, to this Counsel's knowledge.

The filed Opinions on non-routine matters in the Courts below are:

1) By the Supreme Court of Ohio:

A. Judgment Entry dismissing Appeal, February 20, 1991, in Case 90-1309, at Appendix p. 1.

B. Judgment Entry dismissing Appeal, in Case No. 90-1373, February 20, 1991, at Appendix page 2.

2) By Court of Appeals, Lucas County, Ohio:

A. May 18, 1990 Denying the Appeal, at Appendix, Page 3;

B. June 21, 1990, Denying Motion for Reconsideration, at Appendix, Page 16;

STATEMENT OF GROUNDS VESTING JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This Petition for Writ of Certiorari to the Supreme Court of Ohio and to the Court of Common Pleas, Lucas County, Ohio is filed on May 21, 1991 and is within the 90 days under Rule 13 of this Court from the final Judgment of the Supreme Court of Ohio entered in that Court on February 20, 1991, in the 2 cases these appealed from, where the Supreme Court of Ohio denied both discretionary review and dismissed the timely filed Appeals, and the Ohio Supreme Court then rejected Appellants Dutridge's Motion to Certify the Record, and further held that there were no substantial questions presented under the Constitution of the United States of America, nor of the State of Ohio.

The statutory provision believed to confer Jurisdiction in this Court to review the judgment by Writ of Certiorari is Title 28, Section 1257, which reads:

"§1257.State courts;appeal;certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term 'highest court of a state' includes the District of Columbia Court of Appeals.

[As amended July 29, 1970, Pub L91-358,§172(a),84 Stat 590.]"

AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari stems from 3 Cases, which were consolidated in the Court of Appeals, Court of Common Pleas, and so heard and considered in separate Appeals in the Ohio Supreme Court.

Appellants claim that in the main Action, City of Toledo vs. Merrill E. Dutridge and Lloyd W. Dutridge, Court of Common Pleas, Lucas County, Ohio No. 84-1312, that Due Process of Law was denied them in regard to the City's destruction of their garage and its contents, in 2 different ways and grounds;

1. Firstly that after a Hearing on June 22, 1984, that Counsel for both parties agreed to a finding of Public Nuisance, and the Court gave Appellants Dutridge 30 days to repair the said garage. Mr. Dutridge, then 66, and Mrs. Dutridge older, were unable to secure a Contractor to complete the garage, because it was of "Stockade Block" construction, with which Contractors refused to deal. Substantial progress and removal of all pub-

blic dangers were claimed by Mr. Dutridge, who was a builder, and they moved for an Oral Hearing to prove the same, but the Trial Court, the Court of Common Pleas, refused to give them a Hearing, and ordered the garage destroyed, all where there was no real necessity nor need therefor.

2. Secondly, we claim that once the City determined it would thereupon proceed to raze and tear down the garage, that since the City knew that there were many valuable items of personal property stored in the 2 story, 2 vehicle garage, that the City there should have given a reasonable Notice of at least 3 days time so Mr. and Mrs. Dutridge could remove them before the destruction. The Building was large, over $10,000.-- had been invested in it, and there was no real need for Notice not to be given. The Garage had been, except for the repairs and improvements made by Mr. Dutridge after the Court Order of June 25, 1984, in the same condition, for several years with no injury or damage to anyone. The City acted from spite, and from political pres-

sure through the Toledo Blade newspaper, to "make a showing" on the City's Nuisance Abatement Program for abandoned homes.

The Trial Court Judge simply felt that there was no Constitutional Due Process duty to require a Hearing to show necessity and public danger still existing as opposed to Appellants' offered evidence that the conditions of public nuisance and danger had been eradicated.

This Appeal involves three (3) cases which were consolidated in the Court of Common Pleas and in the Court of Appeals. The main action below is C.P. 84-1312, in which the City sought an abatement and destruction of an alleged nuisance in the Dutridge's garage, and also in the Third Count, for recovery for the City's damages and costs in demolishing the garage, and also for its costs in a clean up ordered by the City, previously at the Dutridge's residence.

C.P. 87-0336 was a refiled action which the Dutridge's initiated to recover for an

assault on Mr. Dutridge by Police Officer Thoman on October 7, 1983, and also for damage on October 7, 1983, to some cars of the Dutridges', which without cause and/or necessity were damaged by the city in its several clean-ups, also on October 7, 1983, and later in November, 1983.

The Third C.P. action, which through the City's inadvertence, was filed in duplication, and was therefore dismissed without prejudice.

With that done, we turn to the complex procedural history of these three (3) cases.

The main action, 84-1312, was filed May 22, 1984, by the City of Toledo, Division of Building Inspection, against Mr. and Mrs. Dutridge, praying for a Temporary Restraining Order, a preliminary and permanent injunction for destruction of their garage, and damages. On June 22, 1984, a hearing was held on the Preliminary Injunction, and evidence was taken, and the Court expressed itself clearly, and upon the evidence, the Court stated it was going to grant a Preliminary Injunction. The only point in issue, in the Court's mind, was how

many days to allow the Defendant to complete the garage. The garage itself is a so-called "Stockade" construction, which is unusual, not known commonly to contractors, and more difficult and time taking to construct and to repair. The Court did not issue at that time a "flat out" self executing order for the demolition or destruction of the garage. The order was conditional. Paragraph 5 of the said Judgment Entry June 25, 1984, provided as follows:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon Defendant's failure to post the said bond, and repair the premises as indicated by this order, the Plaintiff, City of Toledo, Division of Building Inspection, is to raze the building forthwith, and the Defendant is hereby ordered to pay the costs thereof."

Mr. and Mrs. Dutridge posted the required $3,700 bond on time. Progress was made in the construction of the garage, and on July 31, 1984, Defendants moved for a short extension of time for the completion of the garage. Without holding any Hearing, to determine whether or not the Dutridges had abated the nuisance, had shown progress in the completion of the

construction of the garage, and was acting in good faith; the court denied the said Motion. A copy of that Judgment Entry was not served upon this Counsel, nor notice thereof given Dutridge's counsel, but was reported served upon the Defendants Dutridge, on August 17, 1984. After that Motion of July 31, 1984, was filed, on August 27, 1984, the Court indicated to both Counsel the Court would see Counsel to discuss questions of law, on the Dutridges' claim for a hearing for an extension, and to see if the Court wanted to act on it. On August 29, 1984, at the time stated by the court to see both Counsel, about noon, Mr. and Mrs. Dutridge, this Counsel and Attorney David L. Toska, then working in the Office of this Counsel, went to the courtroom of Judge Restivo, and presented a Motion to hold up any order of destruction of the garage, as progress was being made in the repairs of the garage, and all nuisance conditions had been abated. The City attorney not then being available, Judge Restivo said that he would schedule a meeting with the city

Counsel and this Counsel. This Counsel then had to go to Columbus for an Industrial Hearing that afternoon and stated to the Court that he would be by at 8:30 to arrange the time for meeting with the city attorney and any other matters, the Court decided. However, the Court that afternoon was apparently notified that the city Attorney would be present the next morning, but no notice was given to this Counsel nor to his office that the City Attorney would be present at 8:30 AM.

It was obvious, and moved in their Motion, that the Dutridge's would offer evidence in support of the Motion and that they wanted to be present, and without any notice nor a telephone call, as is customary if a Counsel fails to appear, that morning or otherwise to this Counsel, the Court at apparently 9:00 went ahead. There had not been any prior order sitting Dutridge's Motion for hearing or the Dutridge's and Counsel would have been there. WE claim that that was a failure to give the effective notice required by the Constitution.

About 10:00 AM on August 30, 1984, this Counsel stopped in at Judge Restivo's Court and the Judge then stated that since the City Attorneys were there at 8:30 AM, that the Court determined to issue the Order for the destruction of the Dutridge's garage. Customarily in Toledo, and we believe throughout Ohio, in time past, when one Counsel does not appear, a member of the Court's staff will telephone the other Counsel not present, and hold matters until he can come over. Such has been done in this case for the City Counsel, and probably for this Counsel. For some reason, neither Judge Restivo nor any of his staff at 8:30 AM on August 30, 1984, called this Counsel or else he would have been there. We repeat. This Counsel had stated that he would come by about 8:30 AM to see if arrangements could be set up with the city Attorney, so that we could all meet to consider questions of how and when the Court would do with our Motion filed the day before to wit; August 29, 1984, for additional time to complete the started, but not finished repair of the Dutridge's

two-story garage.

As stated above, about 10:00 AM, this Counsel went to Judge Restivo who stated that he had gone ahead and issued the order for the destruction of the garage. This Counsel then went ahead with the filing of a Complaint in the Federal court against the City of Toledo and the Division of Building Inspection which had been prepared if Judge Restivo should refuse to give relief, and arrangements were made with Federal Judge Potter, who agreed to see the City Attorney DAvis, and this Counsel in chambers at 12:30 PM. Mr. Dutridge waited in the waiting room.

Judge Potter declined to take action, stating that we should appeal to the Ohio Court of Appeals. City Attorney Geoffrey Davis, then said that he was going to go ahead. Then about 2:00 PM, that afternoon, or maybe before, the City, with Mrs. Bernadette Barth, the city's prime mover, who held much malice and spite against the Dutridge's, was there at the Dutridge's residence. The City

through Attorney Davis, and all concerned, had not given any notice, before, that they were going to come in with bulldozers, and destroy the garage, until after, the appearance before Judge Potter, and there were then no times stated; it was merely a pronouncement that the City was going to raze the garage, but no time was specified. Accordingly, Mr. and Mrs. Dutridge did not have any notice, nor opportunity to get their items of personal property still in the garage out, as the City knew, nor did they have any constitutional hearing, on whether or not, they had complied with the prior orders of Court, in good faith and in substance.

After all this time, it should be obvious to any Court that the city here chose not to give any further notice, although they could have, and there is no showing whatsoever, that at that point in time, one day's delay, or more, would have made any difference, and in truth, one day's delay would not have made any real difference, as the garage was then in better condition than it had been for several years.

On October the First, 1984 these Defendants filed their Notice of Appeal to the Court of Appeals, which was later dismissed, because there was no final order, al all the issues in the instant case, had not been determined.

Even though the Dutridge's had filed their Notice of Appeals in a timely manner, proceedings in the State Action 84-1312, were then held up until the Federal case was completed. In the Federal Court, Judge Potter ultimately ruled to dismiss the Federal Actions because the Federal Court did not have Jurisdiction, since the Dutridge's did not allege that the City, through the Building Inspection Department was implementing and carrying out an Unconstitutional Policy, and absent acts under a set policy denying Constitutional Rights, the Federal Court did not have jurisdiction under Monell v. Department of Social Services, 436 U.S. 658. Such was the only holding and determination made which was essential to the Federal Court's dismissal of the Dutridge's Federal action.

The City will probably claim that since Mr. Rust had stated to Judge Restivo that Mr. Rust would be by at 8:30 AM to attempt to set up a time with City Counsel when the Court would see Opposing Counsel and that this time Notice was given to the Dutridge's and their Counsel that the Court was free Constitutionally and otherwise, to do what the Court wanted.

When on the day before, August 29, 1984, this Counsel appeared with Mr. and Mrs. Dutridge, the Court checked with the City first, and for some reason no time was set. No writing was then made on the Trial Docket sheet to this Counselor's knowledge, that the Dutridge's Motion of August 29, 1984, was for Hearing on August 30, 1984, at 8:30 AM or at any other time, thereafter. By past experience, the Trial Judge then knew that if such had been the oral order of the Judge, that both Mr. and Mrs. Dutridge and their Counsel would have been there. But no such notice was ever given. This Counsel was to appear to

work out a date. Why did the Court not give the Dutridge's and this Counsel, a telephone call to say that the Court had changed its mind, and that the Court was going to take some action at 8:30 AM or as soon thereafter as this Counsel could get there? No such notice was ever given their counsel, nor to the Dutridge's or else both would have been there.

For matters of such importance to Mr. and Mrs. Dutridge, a common respect for their rights and for them as individuals, called for Notice first to this Counsel, as it had been given before to city Counsel, if the Court felt compelled to act so soon. Actually, there was no real need to act so preciptuosly. If there had been, then why didn't Judge Restivo so inform this Counsel, Attorney Toska, and Mr. and Mrs. Dutridge at noon the day before, when a phone call was put in by the Court's staff, and the message received by the Court staff that the City Counsel would meet later, at some yet to be determined time.

The Constitutional claims were made by Appellants Dutridge many times, including the following:

1. Motion For Hearing on Constitutional Rights, filed, August 29, 1984;
2. Defendants Supplemental Response to Plaintiffs' Motion For Summary Judgment;
3. Defendants Second Amended Answer and Counterclaim;
4. Trial Brief, filed May 17, 1988;
5. Request For Instruction To Jury;
6. Dutridges' Third Affidavits; and also Affidavits of May 27, 1987; January 25, 1988.
7. Motion For New Trial.

The Courts have been made well aware of our Constitutional claims, and the Courts have refused them.

ARGUMENT I

AFTER A TRIAL COURT MAKES AN AGREED FINDING THAT AN UNFINISHED RESIDENTIAL GARAGE, WHICH COST THE HOMEOWNER SOME $10,000.-, CONSTITUTES A PUBLIC NUISANCE, AND ORDERS IT REPAIRED WITHIN 30 DAYS, ON THE FILING OF A MOTION FOR ADDITIONAL TIME FOR COMPLETION OF THE REPAIRS, SUPPORTED BY AN OFFER TO TESTIFY THAT A PUBLIC NUISANCE AND ANY PUBLIC DANGERS NO LONGER EXIST, THE TRIAL COURT, AND CITY, PRESSING THE CLAIMED DESTRUCTION OF THE HOMEOWNER'S GARAGE, ARE EACH UNDER A DUE PROCESS DUTY FROM THE FOURTEENTH AMENDMENT TO HOLD A HEARING TO DETERMINE IF THE GARAGE CAN BE SAVED, AS REAL NECESSITY IS THE CITY'S ONLY JUSTIFICATION FOR DESTRUCTION; AND THE HOMEOWNER IS ENTITLED, IF THE GARAGE CAN BE REASONABLY SAVED, TO ADDITIONAL TIME TO EFFECT THE REPAIRS, EVEN THOUGH THE UNUSUAL CONSTRUCTION OF THE GARAGE REQUIRES MORE TIME FOR THE NEEDED REPAIR.

This basic constitutional claim was made at the Trial Court level before the garage was destroyed on August 30, 1984, and there was rejected, as it was in the Court of Appeals, and in the Supreme Court of Ohio.

No controlling decision of this Supreme Court of the United States, dealing with such a factual and legal issue, has been cited by any Counsel nor by any Court.

This claim of a Constitutional right to a Hearing where repairs have been made in part, and obviously, Mr. Dutridge then 67 and with some physical disabilities, and Mrs. Dutridge older, were acting in good faith, and had made substantial progress, we claim, were entitled to a hearing before the valuable garage was destroyed. Appellants Dutridge stood ready to show that all conditions which the City constituted a nuisance had been corrected, so that no longer was there any public danger or nuisance.

The realities of the situation were that the Toledo Blade and others were putting political pressure on City Council to stop delays in the City's Nuisance Abatement Program dealinw primarily with abandoned homes. Thus there was political pressure to "make a showing".

On August 29, 1984, the day before the garage was destroyed on August 30, 1984, Appellants Dutridge filed a "Motion For Oral Hearing on Determination of Constitutional Rights; And Other Relief", asking for protection of their

rights from the City's plans to destroy their 2 story, 2 vehicle, "Stockade Block" garage, stating in support:

"1. Mr. and Mrs. Dutridge have tried in good faith to comply with the prior order of this Court, of June 25, 1984, and have been handicapped and disadvantaged in so doing by reason of their age, their health, inability at times to get materials readily, a greater inability to get people to work with them, and an inability to find any contractor, who was ready and capable of taking over the job of completing the repair of the garage in question; and

2. The garage in question, as was testified before the Court is made generally of a "Stockade Block", and this form of construction is not understood, nor can the work of the repair on it, be undertaken by many contractors; and addordingly, Defendants, although they have tried, have not been able to find a contractor to do the work; and

3. Substantial progress has been made, and if allowed, Defendants will quickly complete the repair of the said garage, and thereby, the value of their property will be increased by over Ten Thousand Dollars ($10,000.00), which is the amount of money they have into the said garage; and

4. The law recognizes the importance of conserving and saving property, rather than destroying it, and defendants ask for this opportunity to add to, and not take away, from the value of their property, and the taxable property of Toledo; and

5. Defendants are acting in good faith, and will shortly complete the repair of the garage in question; and their garage, is not now, constituting any real danger to Toledo, and defendants have acted in compliance as far as they could with the order of this Court."

For Law, we cited in the first paragraph of the Memorandum in Support of Motion, the following:

"In 10 A.AM JUR. 2d Constitutional Law Par 587, at Page 514 reads in part: 'But public necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way.'

Defendants have tried to comply. Submit that, in effect, that Defendants are in a position similar to a person who is charged with Contempt of Court. In both situations, a person is called upon to give a explanation of why, he or she has not complied with the order of the Court. Mr. and Mrs. Dutridge have tried. They are not acting in defiance of the Court. In 17 O.JUR. 3d, Contempt, Par 66, in part reads as follows, at page 397: 'A defendant is entitled to a hearing affording him an opportunity to present facts bearing on his capacity to comply with an order before he can be found guilty of contempt of such order, and denial of such right constitutes an infringement of defendant's right to due process of law under both the federal and state constitutions.'

If Defendants have been taken ill, and their illness had completely prevented them from doing any work, toward compliance with the repairs, then this Court would have recognized that, we submit, as a defense. Same principal applies here."

And on the issue of Contempt, and Due Process requirements, we cited:

"Non-compliance with a Court order is punishable in an action for contempt, but only after the alleged contemnors have been afforded a full hearing on the matter as mandated by

the due process requirements of the Constitution of the United States and the Constitution of the State of Ohio.

In Reed v. Rhodes, 500 F. Supp. 363(1980), at 400, the Court stated:

> '(8) The relevant inquiry in a civil contempt proceeding is whether the defendants took "all the reasonable attempts within their power to insure compliance with the orders." Sekaquaptewa v. MacDonald, 544 F.2d 396, 406(9th Cir. 1976). Thus, 'a finding of civil contempt may be made if it is shown that a party has violated his obligations imposed by a court decree by a failure of diligence, ineffective control, and lack of purpose in effectuating the requirements of the decree.' Jordan v. Arnold, 472 F.Supp. 265, 289 (M.D.Pa.1979). See also Palmigiano v. Garrahy, 448 F.Supp. 659 (D R.I. 1978). (9) Of course, the alleged contemnor has the right to prove mitigating circumstances such as good faith and defenses such as inability to comply or substantial complaince. Washington Metropolitan Transit Authority v. Amalgamated Transit Union, supra; Aspira v. Board of Education, supra.

We respectfully challenge the City to cite any case, where, a homeowner was given, by the prior court order, an opportunity to abate the nuisance, and then thereafter, the Court upheld the condemnation and destruction and razing of the property without any hearing."

No "Cow Cases" -- cases that stand "On all Fours" with the case at Bar have been found.

"The closest case, to this Counsel, supporting the above Proposition of Law No. 1 is Groff v. Borough of Sellersville, 314 ATL. 2d 328 (1974), where destruction of an owner's Building before the owner could appeal, from the Trial Court's Order, when the building

had not been repaired, but was repairable, was held unlawful, and the Trial Court's Order of destruction, on appeal, was reversed for the Trial Court to determine the time needed for repair, and the Appellate Court further ruled that the Borough denied the rights to the building owner, when the Borough destroyed the Building before an appeal could be taken. On June 30, 1972, an Order was entered by the Court of Common Pleas, directing demolition within ten days. The same order had been issued orally by the Chancellor on June 30, 1971 -- one year before! The Appellate Court affirmed the Trial Court's findings of nuisance, and that the building was not beyond repair. In 314 ATL. 2d at Page 331, the Court stated:

'The lower court apparently determined that, because Groff had not complied with this order, the only reasonable remedy was to order the building demolished.

6, 7) Groff argues that he did not comply with the order to repair his building becuase he wished to appeal from the finding that his building constituted a public nuisance, and that he could not appeal from the June 30, 1971, order because it did not constitute a final order. We must agree that the June 30, 1971, order did not meet the requirements of Pa. R.C.P. nos. 1516-1519 (even if the parties had agreed to that procedure), and an appeal therefrom would either have been quashed or remanded to permit the filing of exceptions. See Community Sports, Inc. v. Oakland Oaks, 429 Pa. 412, 240 A. 2d 491 (1968); Philadelphia v. Protect-A-Life Corporation, 3 Pa. Cmwlth. 469. 284 A. 2d 158 (1971). Groff's failure to repair his premises following the June 30, 1971, order, therefore does not conclusively establish that he cannot or will not do so, thus necessitating immediate removal of the building. '

8) When it is determined that a public nuisance in fact exists, the courts should not

devise a remedy harsher than the minimum necessary to properly abate such nuisance. Cf. Barclay v. Commonwealth, 25 Pa. 503 (1855); Hatboro Borough v. Ivycrest, Supra. The lower court here found that Groff's building was repairable, and it should not have subsequently ordered the building demolished without making a further determination that Groff could not or would not abate the nuisance through repairs.

We, therefore, affirm the lower court's finding that Groff's building constitutes a public nuisance, but we vacate the lower court's order and remand the record to that court for the purpose of devising a more appropriate remedy.'

The City below cited Tingle v. City of Wichita, 505 P. 2d 717 (1973) where a Resolution of the City, was issued on October 3, 1967, to diligently repair or the property would be destroyed by the City, and Tingle purchased the property on November 3, 1967, took out the two Building permits, stopped work on September 12, 1968, and thereafter the City thought Tingle ahd abandoned the property, and it was destroyed in December, 1968, and January, 1969. In 700 705 P 2d the Court stated at Page 721:

> '4,5) This court is of the opinion that once a structure has been legally condemned, the propriety of its razing and removal, or failure to diligently prosecute the same on the part of the owner, is a question of fact to be determined by the finder of fact. If in the opinion of the jury, the owner had diligently prosecuted repair or removal, the city would lack authority to raze the structure, and an action would lie for demolition of the building. However, upon review of the record, we are compelled to con-

clude the jury had ample evidence to find the appellant had abandoned repair so as to authorize the city or raze the structure by reason of the owner's failure to diligently prosecute and complete the repair.

6) That being the case, no additional notice or hearing was required.'

In Tingle, the question was one for the Jury - not Summary Judgment.

In Jackson v. City of Columbus, 40 OA2d/ 90,700 2d 92 (1974) the Franklin County Court of Appeals stated in 70 0.0. 2d at Page 94:

'Even assuming a building constitutes such a public nuisance as would justify its razing, if not corrected, the performance of some of the required rehabilitation may be sufficient to make the destruction of the property no longer reasonably necessary to effectuate the abatement of the nuisance. The first paragraph of the syllabus of Solly holds that, with respect to public nuisances, a city may enact legislation providing such nuisances when reasonably necessary to effectuate their abatement.' (Emphasis added.)'

and at Page 95:

'There are two aspects to this burden of proof. One is that the property was a public nuisance. There was sufficient evidence adduced to permit a finding that the property in the condition it existed was a public nuisance. However, in addition, it must be alleged and proved that the destruction of the property was reasonably necessary to effectuate the abatement of the nuisance. If means short of destruction would abate the nuisance, such must be employed.'

In Abraham v. City of Warren, 67 OA 492 (1940), the syllabus by the Warren County

Court of Appeals reads:

'The owner of a building, which is in the advanced state of disrepair and endangers the health and safety of the public, must be given a reasonable amount of time to meet the objections of a municipal building inspector and effect the repairs necessary to put such building in a reasonably safe condition, before a summary order of demolition of the building may be enjoined and the owner may recover damages from the municipality for any destruction of his property that has been accomplished under such summary order.'

In Miles v. District of Columbia, 510 F2d 188 (CA, DC, 1975) the Court stated at Page 192:

'1, 1) A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public health or safety. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe and healthy; such a procedure is the essence of the governmental responsibility to accord due process of law. 7 E. McQuillan, Municipal Corporation ¶24.561 (3d ed. 1968). The District of Columbia statute incorporates these procedural protections and substantive restraints, and its facial constitutional validity has been upheld. Keyes v. Madsen, 86 U.S. App. D.C. 24, 179 F 2d 40 (1940), cert. denied 339 U.S. 928, 70 S. Ct. 628, 94 L. Ed. 1349 (1950).'"

ARGUMENT NO. 2

ONCE A CITY SECURES A COURT ORDER TO RAZE A RESIDENTIAL GARAGE, IN WHICH THE CITY KNOWS THAT MANY VARIED ITEMS OF PERSONAL PROPERTY OF VALUE TO THE HOMEOWNER ARE STORED IN THE GARAGE, BOTH THE COURT AND THE CITY ARE UNDER A CONSTITUTIONAL DUE PROCESS DUTY TO GIVE THE HOMEOWNERS SUFFICIENT NOTICE TO REMOVE WITHIN A REASONABLE AND STIPULATED TIME, ALL ITEMS WHICH THE HOMEOWNERS DESIRE TO SAVE. IN DETERMINING THE AMOUNT OF TIME, THE COURT SHOULD CONSIDER THE REAL CONSEQUENCES OF PUBLIC DANGER FROM ANY DELAY. IF THE BUILDING TO BE DESTROYED HAS BEEN IN SUBSTANTIALLY THE SAME CONDITION FOR MORE THAN A YEAR, WITHOUT CAUSING ANY INJURIES OR LOSSES THEN THE HOMEOWNERS SHOULD BE GIVEN NOTICE TO CLEAN OUT THE BUILDING, AT THE LEAST, THREE DAYS BEFORE THE SPECIFIED TIME WHEN THE CITY WILL RAZE THE BUILDING.

For the rights guaranteed by the Constitution of the United States of America to be fully and properly enjoyed by each person, then the help and guidance of this most distinguished Court is necessary, on matters procedural, as well as substantive.

In C.P. 84-1312, there was a Court of Common Pleas judicial determination on June 25, 1984, that the Dutridge's garage constituted a Public

Nuisance. But the City did not thereby discharge all of its constitutional duties. This Counsel and the Dutridges in the Court of Common Pleas claimed, alleged, moved and offered evidence, in moving on August 29, 1984, for a Court Hearing to determine if by repairs made and other steps taken, the Public Nuisance had been sufficiently abated, so that the Court should not then order the destruction of the Dutridge's garage.

Despite the Dutridge's Motion, no such hearing nor judicial determination was made nor held. But even without going into those issues, and even if this Court should find that the City of Toledo was entitled to an order of destruction, which we at all times vigorously deny, still the City of Toledo was under a Constitutional due process duty to give Mr. and Mrs. Dutridge a reasonable Notice -- we claim three days at least -- that the City three days later as a specified time, was going to raze the building, and that, if the Dutridges wished to save their various items of Personal

Property, then in the garage, that the Dutridges should get all those items out of the garage within the stated three days time.

Such logically flows from the well-decided cases, by this Court, and by other Courts.

Neither this Counsel nor Opposing Counsel has found any decision by this Court directly in point. The closest ruling by the Ohio Supreme Court is Solly v. City of Toledo 7 Ohio St. 2d16, 36 O.O. 2d 9, where Toledo destroyed two houses, and the home owner sued the City of Toledo. City Council had enacted an Ordinance that each of the two residential houses constituted a Public Nuisance. There was no prior judicial finding nor ruling finding of a Public Nuisance. In 36 O.O. 2d at Page 9, Paragraphs 3 and 4 of the Syllabus read:

> "3. Nuisance Page §33.
> Nuisances O. Jur 2nd §50.
>
> Anyone who destroys or injures private property in abating what legislative or administrative officials have determined to be a public nuisance does so at his peril, where there has been

neither a previous judicial determination that such supposed nuisance is a public nuisance nor even an opportunity provided to the owner for an administrative hearing (with a judicial review thereof) on the question as to whether there is a public nuisance.

4. Nuisance Page § 33.
Nuisances O. Jur. 2nd. § 50.

In such an instance, when sued by the owner, the one destroying the property may be held liable for damages caused by its destruction unless he alleges and proves and the trier of the facts finds that what he destroyed was a public nuisance and that its destruction was reasonably necessary for abatement of that nuisance."

We repeat. No case directly in point has been found. But this refinement or clarification of the limitations on the Courts and the City in ordering destruction of the Homeowner's property is based on the well established principle that the City should be empowered to do only that which necessity requires.

In fact, the City may have been under some politican pressure, particularly from the Toledo Blade. But if so, then there was no real necessity for such summary action on August 30,

1984.

A common decency shoudl require every City to give the Homeowners notice ahead of time -- by three days at least -- that the City will come in on such and such a date and such and such a time. To bulldoze the Homeowner's garage is a humiliating experience. Yes, the power of the Government can be asesome. Necessity was exceeded by the City of Toledo. The Good and Restraining hand of this Court is needed.

Relavant here is the holding in In Re Branham, Appeal of, 70 Abs. 491 (Franklin County Court of Appeals, 1953), where the opinion on Page 492 reads:

> "It should be noted first that we recognize this statute is in derogation to the rights of private property and must be strictly construed. State, ex rel. Oil Col., v. Dauben 99 Oh St 406. The authority conferred upon the officer to tear down is not exclusive, but there is the further authority to order repairs to be made. This requires the exercise of a sound discretion and inconstruing the statute strictly it would seem that an order to destroy should issue only as a final resort:

that private property should never be destroyed when it might be lawfully preserved.

"In Maxedon v. Rendigs Commr., 9 Oh Ap 60 at P. 61. in speaking of the powers conferred by this statute, the Court appropriately stated:

"But the property must constitute a nuisance, and the peril be imminent, to warrant such summary action as its destruction.

"The exercise of such power in its nature msst be arbitrary, but it arises from necessity and must always be distinctly for the public welfare and with full recognition of the inviolateness of private property as guaranteed in the Bill of Rights (Sec. 19, Art. I of the Constitution." (Underscoring ours)

The above cases emphasize that no destruction by the City is lawful unless necessary.

As to the duty to give notice of the forthcoming destruction of the contents of the garage, we cite 16A Amer. Jur. 2d Constitutional Law, when Section 588 reads in part:

"¶ 588. Notice and hearing. Where necessary to insure the public safety, the legislature may under its police power authorize municipal authorities to summarily to destroy property without legal process or previous notice to the owner. 84 So

> far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. 85 But in any case in which the property may have a lawful use or in which a fair question arises as to whether the property is such as should be destroyed, notice and hearing are necessary. 86" (Our emphasis)

And as to Notice, Section 841 provides in part:

> "¶ 841. Character and sufficiency. The proceeding or hearing requisite to due process must be appropriate, 28 fair, 29 adequate, 30 and such as is practicable and reasonable in the particular case. 31"

Relevant here is the knowledge that without problem the Dutridge's garage for many years was as it was on August 30, 1984, except for improvements and further repairs by Mr. Dutridge in 1984.

Cases cited under Arguments No. 1 and 2, support the other.

ARGUMENT NO. 3

IN AN ACTION IN THE STATE COURTS WHERE THE PLAINTIFF CITY CLAIMS THAT IN AN ACTION IN THE FEDERAL COURT THAT THE INSTANT DEFENDANTS HAD THEN CLAIMED THE SAME VIOLATIONS AND DENIAL OF THE DEFNEDANTS' CONSTITUTIONAL RIGHTS AND THAT FEDERAL ACTION HAD BEEN DISMISSED WITH PREJUDICE, THE PLAINTIFF CITY IN ASSERTING RES JUDICATA AND/OR COLLATERAL ESTOPPEL, BEARS THE BURDEN OF PROOF OF PROVING AND PLEADING THAT THE SAME LEGAL ISSUE WAS ESSENTIAL TO THE FEDERAL COURT'S JUDGMENT, AND SUCH DEFENSE MUST BE HELD TO FAIL WHERE THE FEDERAL COURT DID NOT HAVE TO REACH SUCH ISSUE IN ITS JUDGMENT BUT INSTEAD RULED THAT THE FEDERAL COURT DID NOT HAVE JURISDICTION, BECAUSE THE CITY WAS NOT ALLEGED TO HAVE COMMITTED ITS VIOLATIONS IN FULFILLMENT OF A PARTICULAR CITY POLICY OR POLICIES.

As to Res Judicata, in the Federal Court we claim that the only essentialissue there decided was that the Federal Court did not have Jurisdiction, as Plaintiffs had not alleged that the Dutridge's rights were :violated as the result of the implementation of a City policy to accomplish such results" -- denying Constitutional rights, and therefore the Federal Court did not have Jurisdiction, and the Complaint was dismissed. Magistrate Carr's ruling, given in

the City's Plaintiff Ex. 20 here reads:

> "The City and the other defendants (various city officials) have filed a motion to dismiss, or, in the alternative, for summary judgment. Although the defendants assert a right to dismissal on several grounds, I find that none of them needs to be addressed, because the complaint on its face does not state a cause of action which can be maintained in this court.
>
> There are four defendants: the City's Building Inspection Department, the former City Manager, the City Law Director, and an assistant City Law Director.
>
> All are entitled to dismissal on the basis of certain well defined and clearly applicable legal principle.
>
> As to the City, the Plaintiffs have not alleged that their rights were violated as the result of the implementation of a City Policy to accomplish such result. Indeed, the complaint itself, by referring to actions taken by the City's agents, clearly simply seeks to impose vicarious liability. This cannot occur under the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978) (no liability upon a municipality unless actions undertaken in fulfillment of particular city policy."

Res Judicata applies only to such judicial determinations as are essential, (See Goodson v. McDonough Power Equipment, 2 Ohio, St. 3rd]93

at 201: (1983), and the essential issue of the destruction of the garage, and the further issue, of lack of reasonable notice of the forthcoming destruction of the garage's contents unless removed, were simply not reached nor Essential in the Federal Action.

The other personal Defendants either had immunity or were held no liable under vicarious liability. Magistrate Carr's Recommendations were simply ratified and affirmed by Judge Potter, who went no further than did Magistrate Carr.

In Ohio, the Burden of Proof is on the Summary Judgment Movant, here the City, and likewise as to their defense of Res Judicata. In Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193 (1983), Justics Holmes stated on Page 201:

> "Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined and essential to the judgment in the prior action.

> Norwood v. McDonald (1943), 142 Ohio St. 299 (27 O.O. 240); First National Bank v. Berkshire Life Insurance Co. (1946), 176 Ohio St. 395 (27 O.O. 2nd 360);" (Emphasis ours)

And also on Page 201:

> "In many cases within which a motion for Summary Judgment is presented relying upon collateral estoppel, there may well have been attendant elements inthe prior cause which could materially have altered the prior judgment, in which event the common party to the prior cause should not be deprived of his right to a trial by jury in the new cause."

And at Page 198:

> "The burden of pleading and proving the identity of issues rests on the party asserting the collateral estoppel. Hernandez v. Los Angeles (C.A. 9, 1980), 624 F. 2d 935. Also, Parkland left undisturbed the requisite of privity, i.e., that collateral estoppel can only be applied against parties who have had a prior "full and fair" opportunity to litigate their claims, C. A. Hardy v. Johns-Manville Sales Corporation. (C.A. 5, 1982, 681 F. 2nd 334, 338.)" (Emphasis ours)

Judges do not always disclose what their real motivations are. Today, in every Court there is a great pressure to dismiss a case, or as in our case, to extricate key issues so as would seem to lessen the demands on the Court

system.

Obviously, this Counsel does not know of all cases so dismissed or stripped of key rights by application of Collateral Estoppel. But Americans do need a declaration by this Court which further reinforce the true limitations of Collateral Estoppel. Otherwise, many worthy persons, whether home owners or corporations, will unjustly be stuck with some adjudication that was never anticipated to have such crucial and far reaching results.

ARGUMENT NO. 4

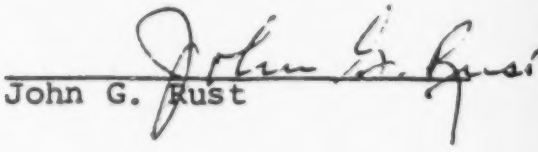
THE TRIAL COURT EFFECTIVELY DENIED MR. AND MRS. DUTRIDGE THEIR CONSTITUTIONAL RIGHTS OF DUE PROCESS BY SIMPLY "BAILING OUT" THE CITY WITNESSES DURING CROSS-EXAMINATION; BY HIS MANNER AND WORDS OTHERWISE COMMUNICATING HIS FAVORITISM FOR THE CITY; AND LASTLY IN HIS INSTRUCTIONS, STATING THE DUTRIDGE'S COUNSEL HAD RECEIVED A COPY OF JUDGE RESTIVO'S JULY 17, 1984 ORDER, AND THEN REFUSED TO CORRECT WHAT HE THEN ADMITTED WAS UNTRUE.

The Transcript of the Trial, our Assignments of Error in the Court of appeals, each bear out the above and more.

CONCLUSION

We submit that there are no direct precedents. At a time when every city has a nuisance abatement program, many home owners like Mr. and Mrs. Dutridge, need a protection by this Honorable Court.

Respectfully submitted,



John G. Rust

90-1813

NO.

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

– OCTOBER TERM, 1990

CITY OF TOLEDO,
DIVISION OF INSPECTION,

Respondent,

versus

MERRILL DUTRIDGE, AND
LLOYD W. DUTRIDGE,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

John G. Rust
COUNSEL OF RECORD FOR
PETITIONERS
833 Security Building, Toledo
Ohio 43604
AC(419) 243-9191

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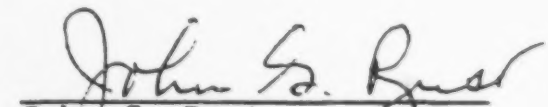
CERTIFICATE OF SERVICE

3 copies of the foregoing Appendix are served by First Class U.S. Mail to City of Toledo Law Director, Keith A. Wilkowski, One Government Center, Suite 2250, Toledo, Ohio 43624 this May 21, 1991.



John G. Rust
Counsel of Record
for Appellants Dutridge

THE SUPREME COURT OF OHIO

1991 TERM

To wit: February 20, 1991

City of Toledo, Division of Inspection, Appellee,

v.

Merrill Dutridge et al., Appellants.

Case No. 90-1309

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by John G. Rust.

(Court of Appeals Nos. L88255, L88256 and L88257)

Thomas J. Moyer (S)
Thomas J. Moyer
Chief Justice

THE SUPREME COURT OF OHIO

1991 TERM

City of Toledo, Division of Inspection, Appellee,	)	To wit: February 20, 1991
	)	Case No. 90-1373
v.	)	E N T R Y
Merrill Dutridge et al., Appellants.	)	

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by JOhn G. Rust.

(Court of Appeals Nos. L88255, L88256 and L88257)

Thomas J. Moyer (S)
Thomas J. Moyer
Chief Justice

APP. P. 2

IN THE COURT OF APPEALS OF LUCAS COUNTY

City of Toledo, Division of Building Inspection,

Appellee

v.

Merrill and Lloyd Dutridge,

Appellants.

Court of Appeals No. L-88-257 (L-88-256) (L-88-255)

Trial Court No. CV 86-1554

DECISION AND JOURNAL ENTRY

Decided:

* * * * *

This is an appeal from three judgments of the Lucas County Court of Common Pleas. The first granted partial summary judgment to appellee, the second entered judgment pursuant to a jury verdict and the third denied appellants' motion for new trial.

Appellants, Merrill and Lloyd Dutridge, set forth the following assignments of error:

> "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GIVING DEFENDANT'S (sic) DUTRIDGE IN ACTION 84-1312, A HEARING, NOR ANY NOTICE THEREOF, BEFORE ISSUING AN ORDER ON AUGUST 30, 1984, FOR THE DESTRUCTION OF THE GARAGE: AND IN NOT NOTIFYING DEFENDANTS NOR THEIR COUNSEL, THAT THE COURT WAS CONSIDERING SUCH AN ORDER ALTHOUGH DEFENDANTS AND THEIR COUNSEL HAD ASKED FOR NOTICE AND HEARING, CONSIDERING SUCH AN ORDER: AND IN ORDERING SUCH DESTRUCTION, WITHOUT

ANY SHOWING OF NECESSITY, AND WITHOUT GIVING, NOR ORDERING ANY REAL NOR TIMELY NOTICE TO THE DUTRIDGE'S (sic) SO THAT THEY COULD REMOVE THEIR PROPERTY IN SAID GARAGE.

"II. THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING THE CITY SUMMARY JUDGMENT IN COURT 3 FOR THEIR COSTS OF DESTRUCTION OF THE GARAGE, AND FOR THE CLEAN UP ON OCTOBER 7, AND NOVEMBER,]983, BECAUSE SAID ORDERS WERE UNCONSTITUTIONAL, NO HEARINGS WERE HELD TO ESTABLISH NECESSITY NOR ACTIONABLE NON-COMPLIANCE BY THE DUTRIDGE'S (sic), AND THE DEFENDANTS HAD EVIDENCE OPPOSING THE CITY'S CLAIMS OF NUMBER OF MEN AND HOURS, ITEMS OF EQUIPMENT, AND OTHER ITEMS MAKING UP THE ENTIRE CLAIMED BILL.

"III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONSOLIDATING ACTION 84-1312 BY THE CITY, AND ACTION 87-0336 BY THE DUTRIDGE'S (sic) FOR ASSAULT AND BATTERY, AND DAMAGE AND DESTRUCTION TO THEIR PERSONAL PROPERTY IN OCTOBER AND NOVEMBER, 1983, BECAUSE EACH CONTAINED ISSUES LIKELY TO, AS THEY DID, INFLAME EMOTIONS, DISLIKES, PREJUDICES, AND ILL FEELINGS AGAINST THE DUTRIDGE'S (sic): WHICH IN TRUTH AND IN FACT WOULD INEVITABLY COME UP, AS THEY DID: AND DENIED THE DUTRIDGES' FAIR AND LAWFUL TRIALS.

"IV. THE TRIAL COURT PREJUDICIALLY ERRED IN ORDERING THE DESTRUCTION OF THE GARAGE ON OCTOBER 30, 1984, without GIVING THE DUTRIDGE'S (sic) A REASONABLE TIME TO REMOVE THEIR PERSONAL PROPERTY, AND IN NOT ALLOWING THE JURY TO CONSIDER THE CITY'S REFUSAL.

"V. THE TRIAL, COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE

DUTRIDGES A FAIR AND LAWFUL TRIAL BY REASON OF EACH, AND ALL, OF THE RULINGS AND ACTIONS BY THE TRIAL COURT, INCLUDING, WITHOUT EXCLUDING OTHERS, THE FOLLOWING:

"A. IN GRANTING SUMMARY JUDGMENT DENYING THE DUTRIDGE'S (sic) THE RIGHT TO RECOVER FOR DAMAGES FROM THE CITY'S UNCONSTITUTIONAL AND KNOWING VIOLATIONS OF THE DUTRIDGE'S (sic) CONSTITUTIONAL RIGHTS;

"B. IN HOLDING THE DUTRIDGE'S (sic) UP AS PEOPLE WHO WERE TRYING TO RECOVER FOR SOMETHING WHICH THE DUTRIDGE'S (sic) WEREN'T ENTITLED TO;

"C. IN USING WORDS, WHICH DESPITE THE STATEMENTS OF DISCLAIMER, SO AS TO CREATE IN THE JUROR'S MINDS IMPRESSIONS THAT THE COURT FAVORED THE CITY, WHEN THOUGH THE COURT DID NOT SO INTEND;

"D. IN ALLOWING THE CITY TO BRING OUT MANY MATTERS GOING BACK A LONG TIME BEFORE AUGUST 30, 1984, AFTER THE DUTRIDGE'S (sic) WERE INSTRUCTED TO CONFINE THEMSELVES TO THAT DATE; AND THERE THE CITY, BY SHOWING THE DITRIDGE'S (sic) HAD RETAINED PERSONAL PROPERTY FOR A LONG TIME, WERE ABLE TO WORK A PREJUDICE AGAINST THE DUTRIDGE'S (sic);

"E. BY DENYING TO INSTRUCT THE JURY, ON THE VARIOUS POINTS MOVED AND REQUESTED BY THE DEFENDANT'S (sic)DUTRIDGE; AS REQUESTED, SPECIFICALLY, AND ALSO BY DEFENDANT'S (sic) REQUEST FOR INSTRUCTIONS TO JURY, EX. A.;

"F. BY VARIOUS ERRONEOUS RULINGS ON EVIDENCE.

"VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING THE DUTRIDGE'S (sic) MOTION FOR A NEW TRIAL."

The factual and procedural history of this case is as follows. On May 22, 1984, appellee, the City of Toledo, filed a complaint against appellants seeking injunctive relief and damages concerning the abatement of nuisance conditions existing at appellants' premises at 2943 Escott, Toledo, Ohio. (Case No. 84-1312.) The city sought abatement of the nuisance by demolition of a garage located on appellants' premises and requested the costs incurred in razing the garage as well as the costs incurred in a prior cleanup of the same premises.[1] In a Juhe 25, 1984 judgment entry, approved and signed by counsel or both parties, the court declared the garage a nuisance and ordered appellants to rehabilitate and repair it within thirty days. The court further ordered that if appellants failed to repair the garage within the time allotted, appellee was to raze the garage "forthwith" and appellants were to pay the costs of the demolition. On July 31, 1984, appellants filed a motion for an extension of time to repair the garage which was denied on

August 17, 1984. On August 29, 1984, appellants filed a motion for oral hearing regarding the court's June 25 and August 17 orders. The record reflects by a docket sheet entry dated August 30, 1984, the following:

> "Attorney Geoffrey Davis present on behalf of plaintiff. Attorney for defendant failed to appear. Court Reporter ordered. Plaintiff to effectuate entry of 6-22-84 (6-25-84)."

Thereafter, on August 30, 1984, appellants filed a complaint in the U.S. District Court (case No. 84-7724) seeking an injunction to prevent the demolition of their garage and alleging constitutional rights violations. When the U.S. District Court denied appellants' request for a temporary restraining order, appellee proceeded to raze appellants' garage pursuant to the order of the Lucas County Common Pleas Court. On January 17, 1986, the U.S. District Court adopted the magistrate's report and recommendation and dismissed appellants' complaint. In his report and recommendation, the magistrate found that appellee and the other defendants named in the complaint were

immune from prosecution and, therefore, entitled to dismissal of the claims against them. The magistrate also found that the defendants were entitled to dismissal on the basis that no due process violations occurred prior to the destruction of the garage. The magistrate noted that counsel for appellants had entered into a consent agreement which set a deadline for rehabilitation and provided for demolition if the deadline was not met.

On October 9, 1984, prior to the U.S. District Court's dismissal of case No. 84-7724, appellants filed a complaint in the Lucas County Common Pleas Court against appellee alleging, among other things, deprivation of their constitutional rights and that appellant Lloyd Dutridge was assaulted by city police officers during the October 7, 1983 yard cleanup by appellee.[2] (Case No. 84-2599.) On January 31, 1986, that case was dismissed without prejudice for appellants' failure to provide discovery. On January 30, 1987, case No. 84-2599 was refiled under case No. 87-0336

and subsequently consolidated with case No. 84-1312 at a pretrial conference held on April 16, 1987.

On January 7, 1986, a complaint was filed in Toledo Municipal Court by Attorney Donald Green, assignee of the city of Toledo, to recover from appellants the costs of the October 1983 yard cleanup and the August 30, 1984 demolition of the garage. (Case No. 86-00362.)

On March 13, 1986, appellants filed an answer and counterclaim alleging the same facts and claims as presented in their complaint filed on October 9, 1984. (Case No. 84-2599 subsequently refiled under case No. 87-0336.) This case was transferred to the Lucas County Court of Common Pleas and assigned case No. 86-1554 and on February 4, 1987, it was consolidated with case No. 84-1312.

On September 8, 1987, in case No. 84-1312, appellants filed their second amended answer and counterclaim alleging that (1) the city damaged various items of personal property worth $40,000 by a reckless and unreasonable demolition and

(2) the city's actions in razing the garage were unconstitutional. On October 7, 1987, appellee filed a motion for summary judgment and memorandum in support thereof and on May 18, 1988, the trial court filed its opinion and judgment entry granting partial summary judgment. The court found that (1) appellee was entitled to recover the costs incurred in the demolition of the garage and the yard cleanup and (2) appellants' constitutional claims were barred by the doctrines of res judicata and collateral estoppel. The claims remaining for trial included appellants' assertion that appellee recklessly destroyed appellants' personal property during the razing of the garage and appellants' allegation that appellant Lloyd Dutridge was assaulted by a Toledo police officer during the October 1983 yard cleanup.

The case proceeded to a jury trial on May 25, 1988, and on May 27, 1988, the jury rendered a verdict in favor of appellee. A motion for new trial was filed on June 30, 1988,

and overruled on July 13, 1988. On August 12, 1988, appellants filed a timely notice of appeal.

Since appellants first, fourth and part A. of appellants' fifth assignment of error relate to the same issue, specifically, whether appellants' constitutional rights were violated prior to the demolition of their garage, this court will consider them together.

In these assignments of error, appellants assert that they were denied notice and a hearing prior to the demolition of their garage and further that they were not given reasonable time to remove their personal property prior to the razing.

This court has thoroughly examined the entire record in this case and the law that applied to the issue raised in these assignments of error. Such review compels this court to conclude that the opinion and judgment entry prepared by Judge William J. Skow is in all respects a complete and proper recitation of the facts and law which apply to this case and that said judgment as it pertains to these assignments of error is correct. Accordingly,

e find appellants' first, fourth and part A. of appellants' fifth assignment of error not well-taken and accept and incorporate the opinion and reasoning of the trial court as our own and enter judgment accordingly. See opinion and judgment entry attached as Appendix A.

In their second assignment of error, appellants contend that the trial court erred in granting summary judgment as to Count 3 of appellee's complaint (case No. 84-1312) regarding the costs incurred for the October 1983 yard cleanup and the August 30, 1984 garage demolition.

Again, we find the decision of Judge Skow to be dispositive of the issue raised in this assignment of error. For this reason, that judgment affirmed and adopted as our own with regard to the trial court's finding as to Count 3 of appellee's complaint. Accordingly, appellants' second assignment of error is found not well-taken. See opinion and judgment entry attached as Appendix A.

In their third assignment of error, appellants

contend that the trial court erred in consolidating case No. 87-0336 with case No. 84-1312. Appellants assert that the nuisance claims set forth by appellee in case No. 84-1312 were prejudicial to their assault and battery claim set forth in case No. 87-0336.

Civ. R. 42(A) provides as follows:

> "(A) Consolidation. When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

See, also, Supp. R. 7.07.

The record reveals that on February 20, 1987, appellee filed a motion to consolidate case No. 87-0336 with case No. 84-1312 pursuant to Supp. R. 7.07. In its motion, appellee maintained that case No. 87-0336 raises the same facts and claims as alleged in a counterclaim raised by appellants in case No. 86-1554 and consolidated with case No. 84-1312. At a pretrial conference held on April 16, 1987, the

court granted appellee's motion and consolidated case No. 87-0336 with case No. 84-1312.

Upon consideration of the particular facts and circumstances of this case as set forth above, we find that the trial court did not abuse its discretion in consolidating case No. 87-0336 with case No. 84-1312. See Fair v. School Employees Retirement System (1975), 44 Ohio App. 2d 115. A review of the record herein reveals that the actions herein involve common questions of law and fact. Accordingly, appellants' third assignment of error is found not well-taken.

Appellants' fifth assignment of error is divided into six parts. Essentially, appellants argue that they were denied a fair trial because (1) statements made by the trial court were prejudicial to appellants, (2) the trial court failed to instruct the jury as requested and (3) the trial court erred in its various rulings on the admissibility of evidence.

Upon review of the trial transcript, we find that the trial court's comments to the jury to be

wholly appropriate. Further, as to appellants' objections to the trial court's rulings on the admissibility of evidence, appellants fail to address any specific claimed error. Pursuant to App. R. 12(A), this court need not address any claimed error not argued in the brief. However, in the interest of justice, this court has reviewed the entire transcript and finds no prejudicial error as claimed by appellants. Finally, as to appellants' contention that the trial court erred in failing to instruct the jury as requested we find that the trial court did not commit prejudicial error in refusing such instructions. Accordingly, appellants' fifth assignment of error is found not well-taken.

In their sixth assignment of error, appellants content that the trial court erred in not granting appellants' motion for new trial filed on June 30, 1988, and overruled on July 13, 1988.

In Verbon v. Pennese (1982), 7 Ohio App. 3d 182, 184, this court stated as follows:

> "The granting of a motion for new trial rests largely in the sound discretion of the trial court, and

the granting or refusal of such motion will not be disturbed upon review unless there is an abuse of judicial discretion."

A thorough review of the entire record herein reveals no abuse of discretion on the part of the trial court in overruling appellants' motion for new trial. Accordingly, appellants' sixth assignment of error is found not well-taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal. All pending motions are hereby rendered moot and found not well-taken.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Appellate Procedure. See also Suup. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.

PRESIDING JUDGE

George M. Glasser, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

[1]On September 21, 1983, appellee, pursuant to Toledo Municipal Code Section 1353.02, served appellant, Merrill Dutridge, with written notice declaring the premises at 2943 Escott, Toledo, Ohio, to be a public nuisance and ordering appellants to clean up the premises within twenty-four hours. On October 7, 1983, appellee commenced abatement procedures at 2943 Escott. On October 11, 1983, appellant, Merrill Dutridge, filed a motion for injunctive relief requesting the court to enjoin appellee from abating the nuisance conditions existing in the yard at 2943 Escott. A hearing was held on October 21, 1983, before Judge Joseph B. Grisby. In a judgment entry filed November 10, 1983, the court ordered appellant, Merrill Dutridge, to clean up the yard by November 10, 1983. The court further ordered appellee to clean up the yard if appellant failed to do so by November 10, 1983. On November 14, 15, and 16, appellee proceeded to clean up the yard pursuant to the court's November 10, 1983 order.

[2]See fn. 1.

IN THE COURT OF APPEALS OF LUCAS COUNTY

FILED: June 21, 1990

City of Toledo Division of Building Inspection	Court of Appeals No. L-88-257 (L-88-256) (L-88-255)
Appellee	
	Trial Court No. CV 86-1554
v.	
	DECISION AND JOURNAL ENTRY
Merrill and Lloyd Dutridge	
	Decided: June 21, 1990
Appellants	

This matter is before the court on defendants-appellants' motion for reconsideration of this court's decision of May 18, 1990.

As stated in Matthews v. Matthews (1981), 5 Ohio App. 3d 140, at paragraph two of the syllabus:

> "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

Upon full consideration of appellants' motion for reconsideration, this court finds that appellants have failed to call to our attention

any "obvious error" in our decision, or raise any issues that have not been thoroughly considered by this court in the original appeal. Accordingly, we find appellants' motion for reconsideration not well-taken and the same is hereby denied.

Peter M. Handwork, P.J. _____ Presiding Judge

George M. Glasser, J. _____ Judge

Charles D. Abood, J. _____ Judge
CONCUR.

APPENDIX A

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

City of Toledo, Division of Building Inspection,	)	FILED: May 18, 1988
Plaintiffs,	)	Case No. 84-1312
v.	)	OPINION AND JUDGMENT ENTRY
Merrill E. Dutridge, and Lloyd W. Dutridge,	)	
Defendants.	)	

* * * * *

This cause is before the Court of plaintiff City of Toledo's motion for summary judgment filed on October 7, 1986 in Case No. 84-1312, inclusive of the other cases consolidated therewith - Case No. 86-1554 and Case No. 87-0336. In filing the instant motion plaintiff incorporates by reference the arguments set forth in its previously filed motion to dismiss and motion for summary judgment wherein plaintiff requested this Court to dismiss Case No. 86-1554 and Case No. 87-0336, on the grounds that the matters asserted therein were either res judicata, moot and/or collaterally estopped.[1]

Footnote No. 1. At a March 4, 1988 hearing on this matter the City conceded that the pending motion for summary judgment incorporates the law and issues previously raised in their motion to dismiss. The City subsequently filed a motion to supplement its October 7, 1987 summary judgment motion by combining the same with its April 28, 1987 motion to dismiss and for summary judgment. This motion to supplement was granted May 17, 1988.

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APP. P. 19

In its Opinion and Judgment Entry of August 21, 1987 this Court denied plaintiff's prior motion to dismiss but gave plaintiff leave to file this subsequent motion for summary judgment. This Court also reserved ruling on plaintiff's prior motion for summary judgment as to Case No. 84-1312. On March 4, 1988, a hearing was held on the present motion for summary judgment. Based on the oral testimony elicited at the hearing, the exhibits proffered, the affidavits and the memoranda of counsel this Court finds plaintiff's motion well-taken and therefore granted in part and not well-taken and therefore denied in part, as will be set forth below.

The present action arose as a result of nuisance conditions existing in and at the defendants' premises at 2943 Escott, in Toledo, Ohio in 1983 and 1984. This cause, No. 84-1312, was filed in May of 1984 by plaintiff for injunctive relief and damages concerning the abatement of the nuisance conditions. The city requested abatement of the nuisance by demolition of a garage located on the Dut-

ridges' premises and requested its costs incurred in the present abatement action and those incurred in a prior clean-up of the same premises. The Dutridge's, in their second amended answer and counterclaim filed on September 8, 1987, counterclaimed for compensatory and punitive damages. In Court One of their counterclaim the Dutridges allege that the City damaged property worth $40,000 by a reckless and unreasonable demolition. In Count Two of their second amended counterclaim the Dutridges assert that the City's actions in razing the garage were unconstitutional as they were taken without hearing or reasonable notice.

Consolidated with Case No. 84-1312 is Case No. 87-0336 which was originally filed by the Dutridges on October 9, 1984 as Case No. 84-2599 against the City of Toledo, a Toledo Police Officer and the Toledo Police Department, for alleged incidents occuring on October 7, 1983 at 2943 Escott during an earlier yard clean-up by the City. This case

was dismissed without prejudice in January of 1986 and refiled as Case No. 87-0336. In Count One of this complaint the Dutridges allege violations of their constitutional rights and property damage by the City as a result of its conduct on that date. In Count Two of the complaint the Dutridges allege that Mr. Dutridge was assaulted and battered by a police officer on October 7, 1983.

Also, consolidated with Case No. 84-1312 is Case No. 86-1554, which was initially filed in January of 1986 in Toledo Municipal Court by Donald Green, assignee of the City of Toledo, to collect from the Dutridges the costs of the November 1983 yard clean-up and the September 1984 garage demolition. This action was subsequently transferred to this Court when defendants, the Dutridges, filed counter-claims against the City of Toledo which exceeded the jurisdictional limit of the Municipal Court. In Count One of their counter-claim the Dutridges again request compensatory and punitive damages for damage to their

property worth $40,000, which was destroyed in the garage demolition. In Count Two of their complaint the Dutridges again seek damages for the alleged assault and battery of Mr. Dutridge on October 7, 1983.

The Court will consider the City's motion for summary judgment, as it relates to each of the counts of the complaint and counter-claims set forth above.

I. CASE NO. 84-1312

In both its previous and instant motion for summary judgment plaintiff asserts that pursuant to statute and prior court orders it is entitled to summary judgment on the remainder of Count Three of the complaint that it incurred and shall be reimbursed for costs expended in the abatement of the nuisance conditions at 1943 Escott in the amount of $4,077.01. In support of these assertions the City contends that Rev. Code 715.26 and 715.29; Toledo Municipal Charter §§8(1) 8 (r); and Toledo Municipal Code 1353.01 empower it to declare

the conditions existing at 2943 Escott to be a nuisance and abate the same. Plaintiff asserts further that a judicial determination was made as to the nuisance status at that address and this Court previously authorized it to abate the same and assessed the costs of abatement to the Dutridges. Plaintiff contends, therefore, that all that remains for determination on Count Three of the complaint is the amount of costs expended in abatement and the undisputed evidence indicates that total costs were $4,077.01.

A review of the record regarding Case No. 84-1312 indicates that Count One of the complaint was voluntarily dismissed by the City in May of 1984. In a Judgment Entry filed on June 25, 1984, Judge Restivo declared the garage at 1943 Escott to be a public nuisance and ordered the Dutridges to post bond and repair the garage within thirty days or the City would be authorized to raze it at the Dutridges expense, thus entering judgment on Count Two of the complaint and part of Count Three as it pertains to the right of the City

to recover costs expended in the demolition of the garage. (See Plaintiff's Exhibits Nos. 14 and 15.) On August 17, 1984, Judge Restivo signed a second judgment entry wherein he found that the defendants had not obeyed the order of June 25, 1984, and authorized the City to effectuate the remainder of that order by razing the building at the cost of the Dutridges. (See Plaintiff's Exhibit No. 16) At that time no determination could be made as to the costs of abatement.

This Court has reviewed the pertinent statutory provisions and the previous court orders herein, and finds that plaintiff is entitled to recover the costs incurred in the demolition of the garage. The Court finds further that plaintiff is also entitled to recover its costs incurred in the previous nuisance abatement effectuated by the November 1983 yard clean-up, as was also requested by plaintiff in Count Three of the complaint. Therefore, all that remains to be determined is the total amount of abatement costs plain-

tiff is entitled to. Plaintiff has submitted invoices reflecting the amounts expended in the November, 1983 yard clean-up and the September, 1984 garage demolition, these amounts being $996.22 and $3,080.79 respectively. (See Plaintiff's Exhibits Nos. 10 and 18) Counsel for defendants, at the oral hearing on plaintiff's motion for summary judgment, stated that defendants question by affidavit the man hours claimed by the City, however, no competent evidence has been offered in support of their contentions tending to raise any issues of fact as to the costs incurred by plaintiff. Accordingly, this Court finds that the undisputed evidence demonstrates that the total costs expended by plaintiff in abating the nuisance conditions existing at 2943 Escott on November of 1983 and September of 1984 amount to $4,077.01. However, at this time final judgment for plaintiff in that amount shall not be entered pending determination at trial as to Count One of the Dutridges' counterclaim wherein they allege that $40,000 in pro-

perty damage was incurred in the abatement of the garage, which could result in a potential setoff.

The Court will consider next plaintiff's motion for summary judgment as it relates to Count Two of the Dutridges' counterclaim against the City wherein they allege violation of their constitutional rights of due process in the demolition of their garage. The City maintains that this counterclaim must be dismissed on the basis of res judicata, mootness and/or collateral estoppel by virtue of a ruling rendered by the U.S. District Court for the Northern District of Ohio, Western Division in Case No. 84-7724, filed by the Dutridges against the City raising this same issue. In support of this assertion the City proffers the report and recommendations of the Federal Magistrate and the final order of the District Court dismissing the Dutridges' case. The City asserts that the District Court found that the Dutridges due process rights had not been violated in abatement of the nuisance

conditions on their premises.

In Norwood v. McDonald (1943), 142 Ohio St. 299, 305, the Court discussed the doctrine of res judicata:

> "A comprehensive definition of res judicata is as follows: 'The doctrine of res judicata is that an existing final judgment rendered on the merits, without frand or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction',"
> * * *
> "If, however, the two suits do not involve the same claim, demand, and cause of action, such effect will not be ordinarily given to the prior judgment 30 American Jurisprudence, 914, Section 172. To constitute a bar there must be identity not only of subject matter but also of the cause of action. In other words, a judgment in a former action does not bar a subsequent action where the cause of action prosecuted is not the same, even though the action relates to the same subject matter." (citations omitted).

In determining whether or not the two actions are to be considered as one, the test generally applied is to consider the identity of facts essential to their maintenance and to

ascertain if the same evidence would sustain both causes of action. If such is the case, then the former action is a bar to the subsequent action even though the two actions are different in form. Norwood, supra; Rush v. Maple Heights (1958), 167 Ohio St. 221; The Ohio Fuel Gas Co. v. City of Mt. Vernon (1930), 37 Ohio App. 159.

The principle of res judicata includes the doctrine of collateral estoppel which precludes relitigation in a subsequent action of an issue of fact or law previously litigated and determined by a valid, final judgment when said determination is essential to that judgment. Seibel v. Crown Cork & Seal Co., Inc. (June 18, 1986), Hamilton App. No. C-850758, unreported; Hicks v. DeLaCruz (1977), 52 Ohio St. 2d 71. In order to assert collateral estoppel successfully, a party must plead and prove the following elements:

> 1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;
>
> 2) There was a final judgment on the merits in the previous case after a

full and fair opportunity to litigate the issue;

3) The issue must have been admitted or actually tried and decided and was not necessary to the final judgment; and

4) The issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher (1984), 21 Ohio App. 3d 179, 180-181; see Park Lane Hosiery Co. v. Shore (1979), 439 U.S. 322, 326; Hicks v. DeLaCruz (1977), 52 Ohio St. 2d 71, 74-75 (6 O.O. 3d 274).

Upon consideration of the evidence proffered by plaintiff this Court finds that the Dutridges are precluded on the basis of collateral estoppel from bringing their counterclaim alleging violation of their rights of due process in the destruction of the garage. Case No. 84-7724 was filed in District Court by the Dutridges against the City of Toledo and other defendants. In their complaint, the Dutridges alleged violations of their due process rights arising out of the demolition of their garage, the same claim as is set forth

in Count Two of their counterclaim herein. (See Plaintiff's Exhibit 20). On September 13, 1985 the Magistrate issued his report and recommendations in Case No. 84-7724 finding that the defendants named by the Dutridges were immune from prosecution and, therefore, entitled to dismissal of the claims against them. The Magistrate also found, however, that the defendants were entitled to dismissal on the merits, finding that no violation of the Dutridges' due process rights occurred prior to the destruction of the garage. Id. In so finding, the Magistrate pointed out that counsel for the Dutridges had entered into a consent agreement which set a deadline for rehabilitation and provided for demolition if the deadline was not met. The Magistrate stated that at that point all the dictates of due process had been satisfied. In the final order of Case No. 84-7724 dated Juen 17, 1985, Judge Potter considered the Dutridges objections to the Magistrate's report finding them to be without merit and adopted the report and

and recommendations as the order of the court and dismissed the Dutridges' complaint. (See Plaintiff's Exhibit 20).

In light of the foregoing, it is clear that the prerequisites for collateral estoppel as set forth in Monahan, supra, have been met and the Dutridges should not therefore be permitted to relitigate the issue of due process as it pertains to the demolition of their garage. This Court finds further that the other constitutional violations alleged by the Dutridges in Count One of their counterclaim herein are[2] barred by the final judgment in Case No. 84-7724 on the grounds of res judicata for they should necessarily have been asserted therein since they are based on the same cause

2. In their counterclaim the Dutridges also allege, briefly, other constututional violations of their property rights. At the hearing on this matter counsel for the Dutridges argued these issues had not been addressed by the District Court in Case No. 84-7724.

of action. Norwood, supra.

Accordingly, this Court finds plaintiff's motion for summary judgment well-taken as it pertains to Count Two of the Dutridges' counterclaim.

II. CASE NO. 87-0336

In its previous motion to dismiss the City argued that this case must be dismissed pursuant to the doctrines of res judicata and collateral estoppel as the claims asserted by the Dutridges herein concerning property damage, assault and battery and constitutional violations arising out of the October 7, 1983 year clean-up should have been brought in a previous case filed in this Court - Case No. 83-2455.

The record shows that on October 7, 1983, the City entered onto the Dutridges' premises to effectuate a yard clean-up. On October 11, 1983, Mrs. Dutridge filed Cause No. 83-2455 against the City in the Court of Common Pleas seeking temporary, preliminary and permanent

injunctive relief to enjoin the City from proceeding further against their property. (See Plaintiff's Exhibit 1). In the complaint Mrs. Dutridge alleged that on October 7, 1983, the City came onto her property without a hearing and removed valuable items and in so doing acted arbitrarily as the property was not a nuisance. She alleged further that she had been and will continue to be irreparably harmed if the City was permitted to enter their property again and further damage it. On October 21, 1983 a hearing was held and on November 10, 1983 a judgment entry was consented to and signed by counsel for both parties wherein the Court stated that the parties had reached an agreement settling this matter with guidelines as set forth by the court. The Agreement provided that the Dutridges would clean-up the yard by a certain date and failure to do so would result in authorized clean-up by the City. (See Plaintiff's Exhibit No. 9).

Subsequently, on October 9, 1984, the

Dutridges filed Case No. 84-2599 against the City, a police officer and the Toledo Police Department alleging assault and battery of Mr. Dutridge, violation of their constitutional rights by actions of the City of Toledo in entering the premises without legal cause or authority, and damage to their property, all arising out of the October 7, 1983 yard clean-up. As set forth above this case was dismissed without prejudice and later refiled as Case No. 87-0336.

The issue presented here on plaintiff's motion for summary judgment is whether the claims asserted in Case No. 87-0336 should have been asserted in Case No. 83-2455 and therefore must be dismissed with prejudice on the grounds of res judicata and/or collateral estoppel.

The law on res judicata has been previously set forth. Generally, a consent judgment will operate as res judicata to the same extent as a judgment on the merits. Horne v. Woolever (1959), 170 Ohio St. 178. Upon a thorough

review of the evidence submitted by the plaintiff, particularly the transcript of proceedings of the hearing held on October 21, 1983 in Case No. 83-2455, and applying the tests set forth in Norwood, supra, for determining if the two actions should be considered as one, this Court finds that the claims asserted herein as to the constitutional violations and property damage and those brought previously in Case No. 83-2455 as involve a single cause of action and therefore the claims brought herein are barred, pursuant to the doctrine of res judicata, by the consent judgment entered in Case No. 83-2455. However, the Court finds that the assault and battery claim involves a separate cause of action and therefore the Dutridges are not precluded from bringing that claim.

In reaching this determination the Court, in evaluating the record under the Norwood standard, has ascertained that the same operative facts and evidence relied on in reaching the consent judgment in Case No. 84-2455

are essential to establishing the constitutional and damage claims alleged herein. Specifically these operative facts include the condition of the Dutridges' premises past and present, the statutory rights of the City concerning nuisance abatement, and the series of events and actions by the City concerning the Dutridges. In other words, the same proof is required to sustain both actions. It is clear to this Court that both actions involve the same claims with regard to the conduct of the City, and the claims accrued at the same time. However, concerning the Dutridges' assault and battery claim, the opposite is true as different rpoof is required to sustain this claim and the Court finds it constitutes a separate cause of action.

Accordingly, plaintiff's motion for summary judgment is granted as to the Dutridges' claims of constitutional violations and property damage and these claims will be dismissed with prejudice. Plaintiff's motion for summary judgment is denied as to the Dutridges'

assault and battery claim.

III. CASE NO. 86-1554

Finally, considering the City's motion for summary judgment as it relates to Case No. 86-1554, the City argues that the claims filed by Mr. Green should be dismissed with prejudice as should the counterclaims filed by the Dutridges herein. As set forth above, plaintiff Donald Green, as assignee of the City filed this action to collect the costs incurred in the yard clean-up and garage demolition at the Dutridges' premises. The Dutridges filed their same counterclaims against the City alleging constitutional violations, and property damage arising from the garage demolition and an assault and battery claim arising from the October 8, 1983 yard clean-up. The City asserts that the claims brought by Mr. Green should be dismissed since they were filed prematurely and the same claim is currently pending in Case No. 84-1312. The City also asserts that the counterclaims filed by the

Dutridges should be dismissed on the grounds of res judicata and/or collateral estoppel, and because the counterclaims are directed at the City of Toledo, yet the Dutridges failed to third-party in the City.

Concerning the claims brought by plaintiff Green, the Court finds that they are indeed duplicative of those filed and already partially determined in Case No. 84-1312 and that these claims will be more properly and fully addressed in that case and therefore plaintiff Green's complaint will be dismissed with prejudice. As for the counterclaims asserted by the Dutridges in 86-1554, Counts One and Two of the counterclaims (concerning damages incurred in the garage demolition and the alleged assault and battery arising from the October 7, 1983 yard clean-up respectively) will be dismissed with prejudice for the same reasons that the complaint herein is to be dismissed. The counterclaims will be more properly and fully addressed in Case No. 84-1312 and Case No. 87-0336 still pending. As for Count Three

of the Dutridges counterclaim, alleging constitutional violations arising from the garage demolition, the Court has already found in Part I of this opinion that relitigation of this issue is precluded on the basis of collateral estoppel and therefore Count Three of the Dutridges' counterclaim will be dismissed with prejudice as well.

Accordingly, the City's motion for summary judgment as it relates to Case No. 86-1554 is granted.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that:

1. In Case No. 84-1312 the City's motion for summary judgment on Count Three of the complaint is found well-taken and hereby granted in that plaintiff incurred $4,077.01 in abatement costs. Plaintiff's motion for summary judgment as to Count Two of the defendants' counterclaim is found well-taken and hereby granted and the same is dismissed with prejudice. Count One of the Dutridges' counterclaim remains for trial

2. In Case No. 87-0336 the City's motion for summary judgment is found well-taken and hereby granted as to the Dutridges' constitutional and property damage claims and the same are dismissed with prejudice. The Dutridges' assault and battery claim

remains for trial.

3. In Case No. 86-1554 the City's motion for summary judgment is found well-taken and hereby granted. The complaint brought by Donald Green is dismissed with prejudice. Each of the counterclaims asserted by the Dutridges are also dismissed with prejudice.

May 18, 1988

William J. Skow (S)
William J. Skow, Judge

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